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No. 93-1171

In The

Supreme Court of the United States

October Term, 1993

ROBIN R. MOERMAN,

Petitioner,

v.

STATE OF CALIFORNIA, Director of the Department of Fish and Game of the State of California; and DOES I through IX, inclusive,

Respondents.

Petition For Writ Of *Certiorari* To The Court Of Appeal State Of California, First Appellate District, Division One

BRIEF *AMICI CURIAE* OF MOUNTAIN STATES LEGAL FOUNDATION, THE AMERICAN SHEEP INDUSTRY ASSOCIATION, AND THE FAIRNESS TO LAND OWNERS COMMITTEE IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

IDENTITIES AND INTERESTS OF *AMICI CURIAE* ... 2

OPINIONS BELOW, JURISDICTION, STATUTES INVOLVED AND STATEMENT OF THE CASE... 4

SUMMARY OF THE ARGUMENT 4

REASONS FOR GRANTING THE WRIT 5

A. MOERMAN PROPERLY STATED A CAUSE OF ACTION FOR A PHYSICAL TAKING OF HIS PROPERTY FOR A PUBLIC BENEFIT..... 5

1. The Court Of Appeal's Decision Improperly Applies Existing Mandatory Precedent 6

2. There Is No Exception To The *Per Se* Takings Rule For Physical Invasions Of Land Imposed By Government Controlled Animals 8

B. THE COURT OF APPEAL IMPROPERLY DETERMINED THAT MOERMAN HAS NOT BEEN DEPRIVED OF HIS FUNDAMENTAL RIGHT TO EXCLUDE THE ELK..... 10

C. THE DF&G'S ACTIONS WERE INTENTIONAL .. 12

D. THERE ARE COMPELLING INCENTIVE EFFECTS IN GRANTING COMPENSATION TO INDIVIDUALS SUCH AS MOERMAN 13

CONCLUSION 16

TABLE OF AUTHORITIES

Page

CASES

Armstrong v. United States, 364 U.S. 40 (1960).....3, 5

Bettini v. United States, 4 Cl. Ct. 755 (1984)..... 10

Brzoznowski v. Andrus, D.C. Minn., No. CA-5-77-19 (1980)..... 6

Christy v. Hodel, 857 F.2d 1324 (9th Cir. 1989), *cert. denied*, 490 U.S. 1114 (1989).....6, 14

First Evangelical Lutheran Church v. Los Angeles County, 482 U.S. 304 (1987)..... 3

Gasser v. United States, 14 Cl. Ct. 476 (1988)..... 12

Hendricks v. United States, 14 Cl. Ct. 143 (1987)..... 13

Kaiser Aetna v. United States, 444 U.S. 164 (1979)..10, 11

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).....7, 9

Mountain States Legal Foundation v. Hodel, 799 F.2d 1423 (10th Cir. 1986)..... 6

Nollan v. California Coastal Commission, 483 U.S. 825 (1987).....7, 11

Pennsylvania Coal Company v. Mahon, 620 U.S. 393 (1922)..... 16

Pumpelly v. Green Bay, Co., 80 U.S. (13 Wall.) 166 (1871)..... 12

United States v. Cress, 243 U.S. 316 (1917) 12

United States v. Lynah, 188 U.S. 445 (1903)..... 6

TABLE OF AUTHORITIES – Continued

Page

U.S. Fish and Wildlife Service v. Shuler, decision of Dept. of Interior ALJ (March 11, 1993), *appeal filed*, Docket No. 93-13 (April 5, 1993) 6

Yee v. City of Escondido, 503 U.S. ___, 112 S. Ct. 1522 (1992) 4, 8, 9

OTHER AUTHORITIES

Federalist No. 10 (Madison) (C. Rossiter ed. 1961) 5

Nedelsky, J., *Private Property and the Limits of American Constitutionalism* 9 (1990) 5

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BRIEF *AMICI CURIAE* OF MOUNTAIN STATES LEGAL FOUNDATION, THE AMERICAN SHEEP INDUSTRY ASSOCIATION, AND THE FAIRNESS TO LAND OWNERS COMMITTEE IN SUPPORT OF PETITIONERS

Mountain States Legal Foundation, the American Sheep Industry Association, and the Fairness to Land Owners Committee respectfully submit this brief *amici*

curiae, pursuant to Supreme Court Rule 36, in support of Robin M. Moerman, the Petitioner for *certiorari*.[1]

IDENTITIES AND INTERESTS OF *AMICI CURIAE*

Mountain States Legal Foundation ("MSLF") is a non-profit, membership public interest law foundation dedicated to bringing before the courts those issues vital to the defense and preservation of individual liberties, the right to own and use property, limited government and the free enterprise system.

MSLF's members include businesses and individuals who live and work in nearly every state in the union. A large number of MSLF's members work in businesses involved in the utilization and development of natural resources and as a result, are actively involved in many environmental issues.

The American Sheep Industry Association ("ASIA") is a federation of 49 member states and is the national voice of the 110,000 sheep producers in the United States. ASIA was created in 1989 through the merger of the National Wool Growers Association and the American Sheep Producers Council. The history of these predecessor organizations extends back over 120 years and represents the oldest livestock commodity group in the United States. The purpose of ASIA is to promote the general welfare of the sheep industry.

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[1] *Amici* have obtained the written consents of the parties. The written consents have been provided to the Clerk of the Court.

The Fairness to Land Owners Committee ("FLOC") is a Maryland-based, national organization with over 13,000 members who are property owners faced with confiscatory land-use regulations involving a number of federal and state statutes. FLOC is dedicated to protecting property rights, especially the right to the prudent use of one's own land, and is active in educating the public and lawmakers about the difference between conservation and confiscation.

The protection of private property, including crops and livestock, is of paramount importance to farmers and ranchers if they are to be able to pursue their livelihoods. Land is essential to productive agriculture. In an industry where the profit margins are narrow and where the rancher has little control over either the cost of production or the market value of the product, uncontrolled losses of domestic animals or productive land quickly jeopardizes the economic viability of a ranch unit.

For over thirty years, this Court has held that the Takings Clause of the Fifth Amendment was "designed to bar Government from forcing some people to bear public burdens alone which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). Further, this Court has stated that the Takings Clause presumes that the challenged governmental regulation has a valid public purpose, but requires that the government compensate those individuals upon whom a disproportionately large burden of the regulation falls. *See First Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304, 315 (1987). The Fifth Amendment's Takings Clause embodies the idea

that the public has a mechanism to compel private interests to adhere to the public's needs, while establishing a correlative public duty to compensate for private property loss engendered by public action.

In this case, *Amici* urge this Court to apply the Constitution's guarantee of compensation to correct the disproportionate impact of the California Endangered Species Act ("CESA") and the California Department of Game and Fish's ("DF&G") Mendocino County Tule Elk Management Plan.

OPINIONS BELOW, JURISDICTION, STATUTES INVOLVED AND STATEMENT OF THE CASE

Amici curiae hereby adopt Moerman's statement and description of the opinions below, jurisdiction, statutes involved, and statement of the case.

SUMMARY OF THE ARGUMENT

Unless reviewed by this Court, the California Court of Appeal's published decision will provide government entities with the legal authority to engage in species protection programs without regard to the obvious disproportionate burdens such programs place upon private property owners in the name of the common good. Such authority clearly runs counter to the purpose of the Fifth Amendment. Additionally, the lower court's decision to disregard this Court's precedent, set forth in *Yee v. City of Escondido*, 503 U.S. ___, 112 S. Ct. 1522 (1992,) violates the well-established principle of *stare decisis*.

For these reasons, *Amici* urge this Court to accept review of this case.

REASONS FOR GRANTING THE WRIT

A. MOERMAN PROPERLY STATED A CAUSE OF ACTION FOR A PHYSICAL TAKING OF HIS PRIVATE PROPERTY FOR A PUBLIC BENEFIT.

For the Framers of our Constitution, private property was "the clear, compelling, even defining, instance of the limits that private rights place on legitimate government." J. Nedelsky, *Private Property and the Limits of American Constitutionalism* 9 (1990). The Framers saw the protection of property rights – rights in land in particular – as "the first object of government." Federalist No. 10, at 78 (Madison) (C. Rossiter ed. 1961). The Takings Clause lies at the heart of the constitutional scheme to protect such rights from the grasp of transient political majorities; its purpose is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). For the common good, individuals might be forced by the government to give up their property – but only upon payment from the public purse.

The California Court of Appeal's decision in this case destroys this careful balance between individual rights and community needs. It allows a government agency to achieve public goals at the private expense of a single individual. The Court below endorsed the DF&G's determination that rather than pay for the creation of habitat

for Tule elk – which might require the raising of taxes – it would simply impose them on private citizens such as Moerman. The Takings Clause does not countenance that result. To the contrary, it specifically prohibits government from invading "private right under the pretext of the public good." *United States v. Lynah*, 188 U.S. 445, 470 (1903).

The problems experienced by agricultural producers because of protected species are growing in severity and numbers. Problems very similar to that raised in this case were experienced by ranchers in Minnesota (losses to wolves) [*Brzoznowski v. Andrus*, D.C. Minn., No. CA-5-77-19 (1980)]; in Nevada (losses to wild horses) [*Mountain States Legal Foundation v. Hodel*, 799 F.2d 1423 (10th Cir. 1986)]; in Montana (losses to grizzly bears) [*Christy v. Hodel*, 857 F.2d 1324 (9th Cir. 1989), *cert. denied*, 490 U.S. 1114 (1989)], and *U.S. Fish and Wildlife Service v. Shuler*, decision of Administrative Law Judge (March 11, 1993), *appeal filed*, Docket No. D. 93-13 (April 5, 1993). Adding to the burden, the federal government is currently planning to place gray wolves in a large portion of the intermountain west where many of *Amici*'s members pursue their livelihoods. *See* U.S. Fish and Wildlife Service, Draft Environmental Impact Statement For The Reintroduction Of Grey Wolves To Yellowstone National Park And Central Idaho (1993).

1. The Court Of Appeal's Decision Improperly Applies Existing Mandatory Precedent.

This Court has long held that "a permanent physical occupation authorized by government is a taking without

regard to the public interests that it may serve." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982). By so holding, this Court established a *per se* rule of compensation applicable to physical takings cases. "Permanence" need not be determined by a government entity, but may hinge on the actions of a party external and indifferent to the litigation between the plaintiff and the government. Indeed, in *Loretto* this Court noted that such occupation is worse when perpetrated by a stranger because the owner has "no control over the timing, extent, or nature of the invasions." *Loretto*, 458 U.S. at 436. By "physical," this Court noted that "whether the [cable] installation is a taking does not depend on whether the volume of space it occupies is bigger than a breadbox." *Id.* at 438 n.6.

In *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), this Court expanded on these interpretations. *Nollan* involved the issuance of a construction permit conditioned upon the granting of a public easement across the owner's beach front property. The *Nollan* Court affirmed *Loretto*'s rule that a *per se* taking occurs when the government mandates that individuals tolerate non-governmental, third-party intrusions. *Id.* at 831-32. Further, *Nollan* establishes that the permanence requirement in *Loretto*'s *per se* test does not require permanence as such; it requires only a continuing possibility that plaintiff's property may be traversed.

2. There Is No Exception To The *Per Se* Takings Rule For Physical Invasions Of Land Imposed By Government Controlled Animals.

The California Court of Appeal refused to hold that a *per se* taking had occurred in this case, reasoning that the State of California had no ownership of the animals, and therefore could not be responsible for their actions. The practical implications of this analysis are astonishing.

The Court of Appeal is mistaken in its belief that government may escape the *per se* takings rule by the simple expedient of disclaiming control of animals in occupying private property. The Takings Clause would be rendered meaningless if government were able to take private property by this indirect means when it could not constitutionally achieve the same result by directly demanding that the landowner dedicate his property for elk habitat. Further, this Court's precedents do not allow such a result. The physical nature of the State of California's occupation of Moerman's land not only brings this case firmly within the *per se* takings rule laid down in this Court's decisions, but also clearly distinguishes the situation here from that in *Yee v. City of Escondido*, 503 U.S. ___, 112 S. Ct. 1522 (1992).

In *Yee*, this Court considered an argument that laws controlling the rents that mobile home parks could charge their tenants and which limited their ability to terminate a tenancy, amounted to a governmentally-endorsed physical invasion by the tenants, and thus were a *per se* taking. This Court held that the rent and tenancy regulations were not a *per se* taking, because the mobile home parks "voluntarily rented their land to mobile home owners,"

and no law "compels [the parks], once they have rented their property to tenants, to continue doing so." 112 S. Ct. at 1528. "Put bluntly, no government *has required any physical invasion of petitioners' property,*" rather, the "tenants were invited by petitioners, not forced upon them by the government." *Id.* (emphasis added). Thus, the situation in *Yee* was very different from the *per se* physical taking that occurs when "government . . . *requires* the landowner to submit to the physical occupation of his land." *Id.* (emphasis in original).

Moerman has *not* chosen to invite the elk onto his property; he is having "strangers" forced upon him by the State of California. *See Loretto,* 458 U.S. at 436 ("an owner suffers a special kind of injury when a *stranger* directly invades and occupies the owner's property") (emphasis added).

This Court acknowledged the importance of this very distinction in *Yee,* when it said that "[a] different case would be presented were the statute, on its face or as applied, to compel a landowner over objection to rent his property or to refrain in perpetuity from terminating a tenancy." 112 S. Ct. at 1529. This case is tantamount to the government forcing a tenant onto a landlord. Thus, the State compels Moerman to open up a significant portion of his land to the State's Tule elk herds in perpetuity, over his objection, and without compensation.

Citizens, such as Moerman, who are made to suffer permanent property loss, pursuant to governmentally induced third-party physical occupations, are entitled to *per se* compensation, because the Tule elk occupation flows from the California DF&G's Mendocino County

Tule Elk Management Plan. The DF&G has intentionally acted to transport the Tule elk some 400 miles to an area which they had not inhabited since the late 1800's, denying any and all traditional and reasonable means of excluding the animals from Moerman's private property, resulting in an intentional government authorized and induced invasion of Moerman's property for the public's benefit.

The Takings Clause is triggered by the government's action in this case which creates the requisite causation for takings liability. "But for" the DF&G's relocation efforts, the Tule elk would never have been able to physically invade Moerman's once-private ranch. *See Bettini v. United States*, 4 Cl. Ct. 755, 759 (1984) (indicating that government is liable under the Takings Clause for the natural, direct and foreseeable results of its actions). In terms of the effect upon a person deprived of property, such as Moerman, there is no difference between property loss caused by a government actor and that caused by an actor authorized by the government. By forcing this burden on Moerman, the State of California imposes two costs on Moerman – tax dollars and property loss – whereas all other citizens pay only taxes.

B. THE COURT OF APPEAL IMPROPERLY DETERMINED THAT MOERMAN HAS NOT BEEN DEPRIVED OF HIS FUNDAMENTAL RIGHT TO EXCLUDE THE ELK.

In this case, the mere character of the government action deprives citizens, such as Moerman, of their fundamental right to exclude. In *Kaiser Aetna v. United States*,

444 U.S. 164 (1979), this Court considered a regulation that converted a privately owned marina into a public aquatic park. This Court ordered the government to pay compensation to the developers of the private marina, holding that the government's intended navigational servitude went beyond an exercise of "regulatory power" that imposed only "insubstantial devaluation" on the plaintiff's property. *Id.* at 180. The *Kaiser Aetna* decision was driven by a central concern for the property owner's right to exclude, which this Court declared "a fundamental element of the property right." *Id.*, *see also Nollan*, 483 U.S. at 831.

In its opinion, the Court of Appeal stated that "[w]hile as a practical matter it may be difficult for Moerman to exclude the Tule elk from his property without harming them, the state is not requiring him to submit to the occupation." Slip. op. at 9. As the challenged regulation in *Kaiser Aetna* compelled the admission of strangers into an otherwise private marina, the DF&G's Tule Elk Management Plan intentionally compels the admission of elk onto private land. Worse, the Tule Elk Management Plan permits these elk to ravage private property on which they trespass for which the private landowner has no recourse. That the strangers in *Kaiser Aetna* are human while those under the Tule Elk Management Plan are animals is not a principled basis on which to distinguish a legal rule. An owner's right to exclude encompasses the exclusion of any encroachment, whether human, animal, or otherwise.

C. THE DF&G'S ACTIONS WERE INTENTIONAL.

Amici submit that when government agencies, such as the DF&G, engage in reintroductions such as the one here, they must as a matter of civic responsibility, take into account the people who inhabit and make their livelihoods in those areas. The record in this case clearly demonstrates the careless disregard for the people and private property that constituted the Tule elk reintroduction. Worse, the DF&G intentionally relied on the fact that ninety-percent (90%) of the area was under private ownership and that the "elk graze in irrigated and permanent pastures, thereby damaging crops and creating loaf sized potholes in the wet ground." The DF&G has cavalierly decided to thrust the burden of sustaining the public elk by declaring them to be co-tenants in possession with private individuals such as Moerman.

In this instance, the State of California's action of physically introducing relocated Tule elk to the Potter Valley makes them instrumentalities of the DF&G's greater plan to repatriate species to an area which they have not occupied for more than a century. The government should be held as responsible in such a situation as it is where it intentionally diverts flood waters onto private property. A long line of decisions dating back to 1871 establishes the rule that a taking has occurred when the flooding of land induced by authorized government action happens on a permanent, or intermittent but inevitably recurring basis. *See United States v. Cress*, 243 U.S. 316, 328 (1917); *Pumpelly v. Green Bay, Co.*, 80 U.S. (13 Wall.) 166, 179-180 (1871); *Gasser v. United States*, 14 Cl.

Ct. 476, 496 (1988); *Hendricks v. United States*, 14 Cl. Ct. 143, 149 (1987).

D. THERE ARE COMPELLING INCENTIVE EFFECTS IN GRANTING COMPENSATION TO INDIVIDUALS SUCH AS MOERMAN.

Endangered species, like all animals, need food. In an atmosphere such as a zoo, the zookeepers must go out and purchase food for the animals and then feed them. In the wild, however, the animals must get the food for themselves. The CESA and DF&G regulations accommodate this by preventing ranchers, such as Moerman, from excluding the protected species when they feed upon the ranchers' property. While the protected animals may be indifferent to this situation, the rancher is not. The current system is very efficient for the state government. The animals secure the amount of sustenance they require – because they eat when and how much they want – and the government pays nothing. *Amici* believe that this is fundamentally unjust.

Compensating citizens for the property damage done in the process, however, would force the government to internalize the cost of species preservation and could alter the government's chosen preservation method. Absent a corresponding obligation to compensate, the CESA and DF&G regulations provide the state government with some financial relief from its desire to protect species. *Amici* believe the obvious unconstitutionality of this situation is easily remedied by the payment of compensation to Moerman. Because the State of California will only compensate for damage that would not have

occurred but for the CESA and DF&G regulations, such compensation will rightfully distribute the costs of species preservation more evenly throughout society. A succinct statement of this dynamic came from now retired Supreme Court Justice White in his dissent from the denial of *certiorari* in *Christy v. Lujan*:

> There can be little doubt that if a federal statute authorized park rangers to come around at night and take petitioner's livestock to feed the bears, such a governmental action would constitute a "taking. . ." [t]hus, if the Government decided (in lieu of the food stamp program) to enact a law barring grocery store owners from "harassing, harming, or pursuing" people who wish to take food off grocery shelves without paying for it, such a law might well be suspect under the Fifth Amendment. The public should be willing and able to allocate public resources to the preservation of endangered species, either by funding wildlife preserves or by compensating private landowners who feed the animals.

490 U.S. 1114 (1989).

Property can always be taken for the common good – but only if government is prepared to pay compensation out of the common purse. Hence, the distrust of government underlying the constitutional structure of separated powers, checks and balances, and our Bill of Rights, can clearly be seen at work in the Takings Clause, which imposes a taxpayer burden to check the excessive zeal of property-envious governmental agencies. The Takings Clause, moreover, requires the government to treat individuals with dignity by ensuring that, if government

takes the individual's property, it must compensate him for that significant intrusion.

Amici submit that the issues presented in Moerman's Petition for Writ of *Certiorari* are appropriate for this Honorable Court's review. *Amici* believe that the analysis set forth in the Petition for Writ of *Certiorari* is correct on all points of law, and that the decision of the Court of Appeal must be reversed. The issue of whether the State of California is liable under the Takings Clauses of the State and Federal constitutions when it relocates animals, protected under the California Endangered Species Act, and such animals subsequently physically invade private property, is an important issue of first impression for this Court's review. Consequently, *Amici* respectfully urge that the Petition for Writ of *Certiorari* be granted.

CONCLUSION

As laudable as endangered species laws may purport to be, it still must be recognized that "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Pennsylvania Coal Company v. Mahon*, 620 U.S. 393, 416 (1922).

Respectfully submitted,

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